Supreme Court, U.S.
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No. 97-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* BAXTER HEALTHCARE CORPORATION, CLARK OIL TRADING COMPANY, IBP, INC., MOTOROLA, INC., PERSECO ASIA-PACIFIC LLC, AND STONE CONTAINER CORPORATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

If the Court rules that the Harbor Maintenance Tax is unconstitutional, whether an exporter who has paid the Tax and commenced an action for a refund is entitled to a refund of all taxes paid by the exporter?

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INTEREST OF *AMICI CURIAE* AND CONSENT OF PARTIES

Baxter Healthcare Corporation, Clark Oil Trading Company, IBP, Inc., Motorola, Inc., Perseco Asia-Pacific LLC, and Stone Container Corporation, *amici curiae* in this appeal, respectfully submit this brief in support of United States Shoe Corporation ("U.S. Shoe"). Both the petitioner and respondent have consented in writing to the filing of this brief.

Baxter Healthcare Corporation of Deerfield, Illinois, is the world's largest producer and marketer of health care products, systems, and services. It manufactures products in 20 different countries and distributes them in over 100.

Clark Oil Trading Company of St. Louis, Missouri, is a Missouri general partnership. It trades, transports and stores petroleum and petroleum products in various markets.

IBP, Inc. of Dakota City, Nebraska, is the largest U.S. exporter of red meat and related products. It has offices in England, Japan, Taiwan, China, Korea, and Mexico.

Motorola, Inc. of Schaumburg, Illinois, is the world's leading manufacturer of cellular subscriber and infrastructure products, as well as radio, computer, automotive, and semiconductor products.

Perseco Asia-Pacific LLC is a Delaware limited liability company. It provides purchasing services for packaging products for the McDonald's restaurants system.

Finally, Stone Container Corporation of Chicago, Illinois, is the nation's largest manufacturer of kraft linerboard, corrugated medium, and corrugated products. It

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Pursuant to Rule 37.6, *amici* state that no counsel for either party to this case has authored this brief in whole or in part. In addition, no person or entity other than the *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

is one of the world's largest producers of pulp, paper, and packaging products.

As significant U.S. exporters who have paid collectively Harbor Maintenance Taxes ("HMT") in excess of $15 million, *amici curiae* have an interest in the outcome of this appeal. *Amici curiae* agree with Respondent that the HMT violates the Export Clause of the Constitution (U.S. Const. art. I, § 9, cl. 5), but urge this Court also to rule that the statute of limitations contained in 28 U.S.C. § 2636(i)[1] should not act as a bar to recovery of refunds from the date of enactment of the HMT.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case contained in Respondent's Opposition to the Petition for Certiorari. *Amici curiae* note that the case currently before the Court is a test case. Over 5000 other cases are pending in the United States Court of International Trade ("CIT"), as well as several hundred cases in the U.S. Court of Federal Claims ("CFC"), all of which seek recovery of HMT deposits. Some of the cases filed, like

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[1] Under the decisions of the lower courts, the U.S. Court of International Trade has jurisdiction over a refund action pursuant to 28 U.S.C. § 1581(i). The government has not appealed that aspect of the lower courts' decisions to this Court, although it has hinted it may relitigate this issue in other cases. Petition for Writ of Certiorari at 7, n. 2; Petitioner's Brief at 7-8, n. 3.

Section 1581(i) is the "residual" jurisdiction provision of the Court of International Trade and covers a wide variety of actions. Pursuant to 28 U.S.C. § 2636(i), an action brought pursuant to Section 1581(i) must be brought within two years from the date the action accrued.

United States Shoe, seek only recovery of HMT that was due and paid within the two years of the commencement of the refund action.[2] Many of the cases, however, request refunds for HMT paid more than two years prior to the commencement of the actions.

After resolution of this appeal, the government is likely to raise the statute of limitations contained in 28 U.S.C. § 2636(i) as a defense in those actions where a plaintiff seeks recovery of HMT paid more than two years prior to the commencement of the action. Indeed, the statute of limitations issue has already been raised in *United States Shoe*, inasmuch as the three-judge panel of the CIT disagreed on whether the statute of limitations precludes plaintiffs from recovering all of the HMT they have paid. 907 F. Supp. at 421, n.2. In addition, the government has already addressed this issue in its brief at the Federal Circuit by stating that the concurring opinion of Judge Musgrave lacks support. Government Brief at 13-14, n.7. While resolution of this issue will not impact U.S. Shoe's recovery of HMT in this action, *amici curiae* believe the Court should address the issue now because of its importance to the litigation. It is virtually certain that the issue will be raised in another case if not answered here. By addressing the issue in this case, the Court will ensure the speedy administration of justice and not waste judicial resources.

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[2] If the Court disagrees with the position of *amici curiae* in this brief, cases filed in the CFC would be subject to a six year statute of limitations. 28 U.S.C. § 2501(a). However, given the CIT's holding that it has jurisdiction over a refund action pursuant to 28 U.S.C. § 1581(i), and that Section 1581(i) grants the CIT *exclusive* jurisdiction, the government will likely argue the CFC lacks jurisdiction over these HMT refund actions.

SUMMARY OF ARGUMENT

An unconstitutional law is void *ab initio*; it has no effect. Although 28 U.S.C. § 2636(i) states that actions commenced in the Court of International Trade pursuant to 28 U.S.C. § 1581(i) must be commenced within two years from the date the action accrues, application of this statute to an HMT refund action constitutes a violation of due process. The remedy for correcting the collection of an unconstitutional tax must be one which provides complete and meaningful backward looking relief. Allowing the government to keep any of the HMT it collected in violation of the Constitution, when Congress knew it was enacting an unconstitutional law, would not constitute complete and meaningful relief. Instead, it would reward the government's knowing violation of the Export Clause of the Constitution. Alternatively, HMT paid by an exporter may be refunded through equitable recoupment.

ARGUMENT

I.

THE STATUTE OF LIMITATIONS SHOULD NOT APPLY TO AN HMT REFUND ACTION.

A. The HMT Assessed on Exports Is Void *Ab Initio*.

Amici curiae adopt the arguments set forth in Respondent's brief, as well as those set forth in the decisions below, that the HMT violates the Export Clause of the Constitution. If this Court agrees that the HMT is unconstitutional, it also should rule that the HMT is void *ab initio*.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall struck down an act of Congress authorizing the Supreme Court to issue writs of mandamus to federal officials as unconstitutional. In striking down the law, he observed that "a law repugnant to the Constitution is void." 5 U.S. at 177.

While *Marbury* did not involve the Export Clause, the Court applied this principle in the context of the Export Clause nearly 100 years later. In *Fairbank v. United States*, 181 U.S. 238 (1901), the Court held that a tax on bills of lading covering exports was tantamount to a tax on the exports themselves. Accordingly, the Court ruled that the tax violated the Export Clause. Quoting *Marbury*, the Court again observed that a law "repugnant to the Constitution is void." 181 U.S. at 284.

Similarly, in this case the HMT violates the Export Clause. Accordingly, it is void and must be treated as if it were never enacted.

B. The Appropriate Remedy to Correct a Law That Is Void *Ab Initio* Is to Refund All Money Improperly Collected Under the Law.

The Due Process Clause of the Fifth Amendment states that no person may be deprived of property without due process of law. U.S. Const. amend. V. Allowing the government to retain those taxes collected without any authority would deprive exporters of their property without due process. "[A] long line of cases has established that due process requires a 'clear and certain' remedy for taxes collected in violation of federal law." *Reich v. Collins*, 513 U.S. 106, 108 (1994) (citations omitted).

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), for example, the Court reversed a decision of the Florida Supreme Court that refused to grant a refund to taxpayers that paid an unconstitutional excise tax. 496 U.S. at 26. In reversing the Florida Supreme Court, the Court ruled that if a state penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review later, the Due Process Clause of the Fifth Amendment requires the state to afford a *meaningful backward* looking remedy for taxes paid pursuant to an unconstitutional tax scheme. *Id.* at 31. In so ruling, the Court noted that this principle was "firmly rooted in precedent dating back to at least early this century." *Id.* at 32.

Thus, in *Atchison, T. & S.F.R. Co. v. Connor*, 223 U.S. 280 (1912), the Court also instructed:

> It is reasonable that a man who denies the legality of a tax should have a *clear and certain* remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

223 U.S. at 285 (emphasis added). Similarly, in *Ward v. Love County Board of Commissioners*, 253 U.S. 17 (1920), the Court ordered a county to refund unconstitutional taxes it had collected:

> To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the

> property of these Indian allottees arbitrarily and without due process of law.

253 U.S. at 24.

In sum, the rule applicable to unconstitutional taxes such as the HMT is: "If a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J. concurring). Accordingly, this Court should direct the CIT to order the Customs Service to refund all HMT collected by the government for each exporter who has filed suit, plus interest on such deposits.

C. Congress's Knowledge That the HMT Was Unconstitutional Favors Granting Exporters a Complete Refund of All HMT Paid.

While this Court has stated that an unconstitutional claim can become time-barred, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the facts surrounding the enactment of the HMT justify refunding all HMT paid by an exporter. The Court has recognized in the past that the nature of a remedy available in a case depends upon the type of case, and the matter and circumstances involved. *Reynoldsville*, 115 U.S. at 1749.

In this case, Congress knew it was enacting an unconstitutional tax. Evidence of Congress's knowledge is readily obtained from the legislative history of the HMT:

> Based upon its analysis, the Committee determined that section 1301 of H.R. 6, as reported by

> the Committee on Public Works and Transportation, which levies a uniform *ad valorem* tax, *may raise constitutional . . . problems*.
>
> Article 1, Section 9, clause 5 of the Constitution provides "no tax or duty shall be laid on articles exported from any State." . . . *Whether characterized as a tax or a fee, to the extent that such a levy is construed as primarily for the purpose of raising revenue, it is tantamount to a tax on export and in part unconstitutional.*

Report of the House Committee on Merchant Marine and Fisheries, H.R. Rep. 251 (IV), 99th Cong., 1st Sess., at 23 (1985) (emphasis added). Representative Biaggi added:

> Although I believe that the amendments adopted by the Committee to H.R. 6, substituting a cargo fee for the proposed *ad valorem* tax, convert a potentially discriminatory revenue measure to a fee for services, I continue to hold grave reservations concerning the constitutionality and policy implications of an *ad valorem* fee.
>
> First, in my judgment there is no intrinsic relationship between the imposition of a fee on cargo for port dredging services based exclusively on cargo value and the value of services provided. A tax by any other name remains a tax.

Id. at 41 (Additional View of Representative Biaggi). Similarly, Representative Thomas Foglietta also stated:

> Unfortunately, included in this cost sharing scheme are port user fees. Specifically, H.R. 6 contains a 0.04% *ad valorem* fee to be imposed on all cargoes imported, exported, or shipped between U.S. ports. . . . There are many compelling reasons why we should not impose such a user fee; *these range from the constitutionality of such a proposal* to the potential for cargo diversion and possible foreign retaliation.

Id. at 42 (Additional View of Representative Foglietta) (emphasis added). As a result of Congress's recognition that the HMT imposed on exports was unconstitutional, it added a "severability" clause to the Water Resources Development Act ("WRDA"):

> The concern of the Committee and the subject of the [severability] amendment was, for example, that the constitutional arguments that had been made *against imposing a tax on exports might result in the legislation being declared invalid* and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

Id. at 30 (emphasis added).

Although the Customs Service has consistently characterized the charge imposed on exports as a Harbor Maintenance "Fee," to this day, Congress continues to recognize that it has imposed a tax, not a fee. Numerous laws passed since the original WRDA of 1986 have referred to the HMT as a tax, not a fee. *See, e.g., Providing Amounts from the Contingent Fund of the House for the Expenses of Investigations and Studies by Certain Committees of the House*, H.R. Rep. 433, 103d Cong., 2d Sess., 1994, at 302 ("The Subcommittee will investigate the growing controversy over the . . . collection of the Harbor Maintenance Tax."); *Revenue Act of 1992*, S. Rep. 430, 102d Cong., 2d Sess., 1992, at 37 ("The IRC of 1986, as amended, provides . . . that amounts in the Harbor Maintenance Trust Fund shall be available . . . for the payment of all expenses . . . in administering Subchapter A of Chapter 36 (relating to harbor maintenance tax).");

1991 Comprehensive Oversight Initiative of the Committee on Ways and Means, H.R. Rep. 431, 102d Cong., 2d Sess., 1992, at 194 ("The [Harbor Maintenance] Trust Fund is funded by excise taxes, tolls . . . and interest on investments."); *Treatment of Cargo Within the Contiguous United States and Foreign Ports*, H.R. Rep. 732, 102d Cong., 2d Sess., at 1 ("A harbor maintenance excise tax is imposed on the use of U.S. ports. . . .").

The facts of this case differ markedly from those in cases where the Court stated that an unconstitutional claim could be time-barred. In *Tomanio*, for example, the Court ruled that an action alleging a violation of the Due Process Clause of the Fourteenth Amendment (U.S. Const. amend. XIV) was time-barred. Unlike the plaintiffs in the HMT litigation, however, the plaintiff in *Tomanio* did not challenge a law *known by* Congress to be unconstitutional. 446 U.S. at 480. Rather, it alleged that the *conduct* of various state officials violated its right to due process under the Fourteenth Amendment. *Id.*

Similarly, in *Soriano v. United States*, 352 U.S. 270 (1957), the Court ruled that an action alleging a violation of the Fifth Amendment was time-barred. However, as in *Tomanio*, the action in *Soriano* did not involve a challenge to a patently unconstitutional law. Instead, the plaintiff sought reimbursement for damages incurred when the Philippine Guerrilla Army, at the direction of the United States, took its property during WWII. 352 U.S. at 271-72.

For these reasons, this case poses a unique set of facts. The government should not be allowed to keep money it knew at the outset it was not entitled to collect merely

because the statute of limitations has lapsed. Allowing it to do so would compound the injustice committed by enactment of the law.

While statutes of limitation governing suits against the United States are manifestations of sovereign immunity, *United States v. Mottaz*, 476 U.S. 834 (1986), the government should not be allowed to hide behind the cloak of sovereign immunity as a basis for refusing to refund HMT paid by an exporter. Sovereign immunity to lawsuits is predicated on the condition that the sovereign is acting within the powers granted it by the Constitution. When the sovereign acts unconstitutionally, it should not be entitled to any immunity. *See*, Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1427 (1985).

D. The Principles of the Statute of Limitations Are Not Violated By Not Applying the Statute in the HMT Litigation.

The purposes of a statute of limitations are (1) to prevent surprise and (2) to prevent the loss of evidence. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). Neither of these purposes would be frustrated by this Court ordering a full refund of all HMT paid by an exporter.

First, it can hardly be said that the government would be surprised if it were ordered to refund all the HMT it collected. As amply demonstrated above, Congress, from the outset, knew that it was enacting an unconstitutional law.

Second, there has been no loss of evidence. The HMT litigation began, in large part, as a reaction to enforce-

ment of the tax via increased audits of exporters by the Customs Service, which is charged with administering and enforcing the HMT. Since the early 1990s, the Customs Service has issued scores of letters to exporters informing them that they have failed to pay the HMT. Therefore, it is clear that the government has records to quantify the amounts of HMT paid by an exporter.[3]

E. Ordering the Government to Refund All HMT Collected Will Not Have Grave Fiscal Implications.

While the government has indicated that this case raises issues of significant fiscal importance (Petition for Writ of Certiorari at 12), ordering the government to refund all HMT collected from an exporter will not have grave fiscal implications. As noted in Respondent's Opposition to the Petition for Writ of Certiorari, the HMT Trust Fund has amassed a huge surplus of $865 million as of 1996. Opposition to Petition for Writ of Certiorari at 18. The surplus is expected shortly to reach $3 billion. *Id.* at 19. Moreover, collections of the HMT on imports and intra-U.S. shipments remain unaffected by this litigation. *Id.* at 19. When coupled with the fact that many U.S. exporters have not filed suit, and that the attempt to create a class action in this litigation was denied, *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996), it is clear that the

[3] Exporters are required to pay the HMT on a quarterly basis by filing a Customs form listing all export shipments during the quarter and tendering the *ad valorem* amount due on the total value of such exports. 19 C.F.R. § 24.24(e)(2)(ii).

HMT Trust Fund will not be depleted by ordering refunds of all HMT paid by an exporter.

II.

IN THE ALTERNATIVE, REFUNDS OF ALL HMT PAID BY AN EXPORTER SHOULD BE REFUNDED BASED ON EQUITABLE RECOUPMENT.

Although to date the Court has not allowed equitable recoupment to be the sole basis for jurisdiction, *United States v. Dalm*, 494 U.S. 596 (1990), the unique facts surrounding enactment of the HMT justify ordering refunds of all HMT paid based on equitable recoupment. "[A]n action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obligated by natural justice and equity to refund." *United States v. State Bank*, 96 U.S. 30, 35 (1877). This purpose would be clearly served by ordering the United States to refund taxes it collected in violation of exporters' natural rights. "The United States cannot, as against the claim of an innocent party, hold his money which has gone into its treasury . . . ." *Bull v. United States*, 295 U.S. 247, 261 (1935).

CONCLUSION

For the reasons stated above, *amici curiae* Baxter Healthcare Corporation, Clark Oil Trading Company, IBP, Inc., Motorola, Inc., Perseco Asia-Pacific LLC, and Stone Container Corporation respectfully request that the Court affirm the lower court's judgment that the HMT is unconstitutional and order the lower court to

direct Customs to refund all HMT paid by exporters who have commenced an action contesting HMT deposits.

Respectfully submitted,

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